Petitioners FCC and the United States, at 44, *Verizon Comm. Inc.* v. *FCC*, 122 S. Ct. 1646 (2002) (filed April 2001).

Second, once UNE-P becomes practically available, CLECs can use UNE-P in far greater volumes than a UNE-L strategy to serve low volume customer locations. *See* AT&T at 217-24; Z-Tel at 3-4 (the 5 million customers CLECs serve by UNE-P "dwarfs the number of mass-market customers" obtaining service "by any other means"). In Georgia, BTI reports that "[b]y September 2001, UNE-P providers served more than double the lines than those served by switch based CLECs" and "in four months, UNE-P achieved a penetration rate that switch-based CLECs did not reach for more than three years." BTI at 10. Similarly, in Texas, "competitors achieved a larger share in six months with UNE-P than they had in five years with UNE-loops" and CLEC-provided switching. WorldCom at 31; *see also* Texas at 4; *Texas UNE-P Order* at 84-86; UNE-P Coalition at 11. And over the longer run, from January 2000 to June 2001, CLECs won 1 million lines in Texas through use of UNE-P, which was about 90 percent of all of the net competitive gain in Texas in that period. WorldCom at 31. Similarly, in New York in 2001, "UNE-P based competition represented over 90% of the growth in competition." UNE-P Coalition at 11; *see also infra* Part IV (explaining that, after AT&T entered the market in Michigan with an offer based on UNE-P, SBC-Ameritech announced – for the first time in recent history – that it will be reducing its local rates in Michigan).

Third, unlike a UNE-L entry strategy, which has been limited only to areas where a CLEC has established collocation, CLECs can use UNE-P to offer service ubiquitously in a given market. *See* Z-Tel at 2 (Z-Tel can offer local services in New York "on a broad and ubiquitous basis *only* because of the availability of the unbundled network element platform") (emphasis added); WorldCom at 32 ("MCI's goal is to reach 70% of all U.S. households in ILEC

territory by the end of this year. UNE-P is the only viable option for achieving that goal"). Moreover, many CLECs use UNE-P in conjunction with their own switching facilities to provide coverage throughout an entire market, a feature that many customers demand. UNE-P Coalition at 6-7 (describing CLEC service offers, and noting that "serving customers ubiquitously throughout a State is a hallmark of UNE-P-based provision of service"). As NewSouth describes its business model, it "is a facilities-based provider and the majority of its customers are served via NewSouth's switching platform," but it "also provides services to some customers using UNE-P." NewSouth at 21. Because of UNE-P, NewSouth can "serve customers with more ubiquitous transport needs," including "businesses with multiple locations." NewSouth at 21-22; *id.* at 22 ("UNEP allows NewSouth to dramatically expand its geographic reach"); *see also* Eschelon at 27.

Fourth, states that have required ILECs to offer UNE-P at reasonable rates that permit broad-based entry have the highest rates of CLEC market penetration (*see* ASCENT at 38; BTI at 10-11) – evidence that customers value this type of competitive entry. Once again, New York, where UNE-P has been available, leads the nation in competitive market entry by CLECs, which have been able to capture about 27 percent of the market – about half of which is service provided via UNE-P. WorldCom at 30. And the other states with at least some competitive entry – Texas and Georgia, for example – are also states where UNE-P has, at least in some markets, been made practically available. And critically, UNE-P has proven essential to *sustain* competition. As the UNE-Platform Coalition concludes, "the States of New York, Texas, Illinois, Michigan, and Pennsylvania, where there is active UNE-P competition, saw CLEC lines grow by 1.3 million in the first half of 2001, *while the rest of the nation saw CLEC lines decline* by nearly 450,000." UNE-P Coalition at 4 (emphasis added). These actual marketplace data

demonstrate that local competition – particularly for the mass market – is directly tied to the availability of UNE-P. Because UNE-P allows CLECs to access voice-grade loops, CLECs are able to offer competitive services, and satisfy those customers' pent-up demand for competitive local services. If UNE-P is not broadly made available, then certainly the number of mass-market lines that CLECs serve will plainly decline.

2. CLEC are "Choosing" to Rely on UNE-P where use of their own Switches is not Practically and Economically Feasible.

Despite the overwhelming marketplace evidence that UNE-P provides the only mechanism to serve low-volume customer locations, the ILECs claim that almost all CLECs are "choos[ing]" to rely not on UNE-P, but rather on their own switches and other facilities to offer service to their customers, including mass-market customers. *E.g.*, SBC at 70; BellSouth at 83; Qwest at 25. This claim is simply false – and deeply ironic. Given that the ILECs have engaged in an intensive six-year campaign to *deny* CLECs the ability to obtain access to UNE-P at reasonable rates, it is astonishing that the ILECs would simultaneously assert that CLECs have not widely purchased UNE-P, and thus presumably lack interest in using it to enter local markets.

The hypocrisy of the ILECs' claim is amply refuted by the record evidence described above, which demonstrates that CLECs have used UNE-P where it is practically and economically available. Indeed, the numbers would be even higher but for the fact that UNE-P has just recently become practically available in several states, and is still not available at reasonable rates in most other states. AT&T at 225-27; *see also* ASCENT at 14 ("the number of switched access lines provided by competitors making use of the UNE-Platform is increasing dramatically, which is all the more remarkable when one considers the limited availability of the UNE-Platform, not to mention the operational, regulatory, and judicial obstacles that have been

and, in many cases, continue to hinder its usage"); Navigator at 2 (UNE-P has "only been in effect in selected areas" in its territory "for less than one year," and the "dust [is] still settling on some of the hard-fought battles to wrest UNE-P provisioning at realistic prices"); McLeodUSA at 2; WorldCom at 28-32; UNE-P Coalition at 12.

To be sure, for a wide variety of reasons, AT&T and other CLECs would strongly prefer to use their own facilities wherever such facilities are "sensibly duplicable." *Verizon*, 122 S. Ct. at 1668 n.20; AT&T at 222 & Brenner Dec. ¶¶ 12-13; Z-Tel at 39; Eschelon at 10; BTI at 5; GCI at 2, 5, 33-34.[249] However, the significant impairments described above – each borne out of harsh marketplace reality – make it *impossible* for CLECs to practically and economically provide service to low volume locations using their own switches. In fact, as the State commissions have recognized, CLECs typically have no other choice. Thus, where UNE-P is available at reasonable rates, CLECs have and will rely on it, because it is the only currently viable method of overcoming the impairments they face in providing service to low volume customer locations. For example, AT&T recently announced a major entry initiative in Ohio that will rely on the use of UNE-P. AT&T's ability to enter the Ohio local market was made possible in large part because the Ohio PUC recently reduced the UNE rates charged by Ameritech. WorldCom reports the exact same thing. WorldCom at 31 (reduction in migration charge from

[249] The ILECs also place great weight on the fact that some CLECs do not provide any service via UNE-P. SBC at 67-68; Qwest at 25; Verizon at 104. Of course, that may in part be due to the ILECs' stiff resistance to making UNE-P available at reasonable rates that support market entry. As a result, some CLECs have determined that the regulatory uncertainty regarding UNE-P makes other business plans more attractive. In this regard, as the Act contemplates, *Local Competition Order* ¶ 12, many CLECs have chosen to limit their offerings to the segment of the business market with high-volume demand for telecommunications. As the comments of these CLECs demonstrate, these carriers often can offer facilities-based service over their own switches to these larger business customers without many of the same types of impairments that affect the mass-market. *E.g.*, Allegiance at 2.

$111.00 to 74 cents "contributed to MCI's decision to enter the local market in Ohio this February").

3. Use of UNE-P will Spur Deployment of CLEC Facilities.

Numerous CLECs confirm AT&T's showing (at 221-24, 229-31) that use of UNE-P complements the use of other facilities, and allows CLECs ultimately to migrate customers to their own switches once CLECs can practically access customer loops and gain necessary economies of scale. *See* Z-Tel at 76-83 (analysis showing that UNE-P "[s]purs [t]he [d]eployment [o]f [f]acilities"); WorldCom at 82-83, 88-90; UNE-P Coalition at 5-8 ("UNE-P is the foundation of a variety of sophisticated business models that give carriers the ability to provide unique and innovative services to the mass-market"). For example, NewSouth uses UNE-P in conjunction with its own switches to provide local service, but it is also "investing in new technologies that it hopes will eventually enable it economically to migrate customers off of UNEP". NewSouth at 23-24. However, NewSouth requires use of UNE-P today, and cannot simply deploy this technology in the first instance. *Id.; see also* UNE-P Coalition at 5-12.

The comments also show that, in addition to the regulatory, technical, and ILEC-imposed impairments to using their own switches, many CLECs – including AT&T – simply cannot raise the capital to deploy enough switches to compete for all of the ILECs' customers, even all of those customers who could be profitably served if the CLECs had the benefit of the incumbents' economies of scale, scope and density. Thus, they need access to UNE-P to enable them to build the necessary scale and show the proven revenue streams essential to raising affordable capital to deploy additional facilities. As BTI explains, it has been unable to attract the capital to deploy new switches in a number of markets, and it had to "cancel[] switch orders" and "incur[] substantial penalties" as a result. However, the "availability of UNE-P allowed BTI to attract customers in these markets and BTI plans to eventually install facilities." BTI at 5. Thus, for

BTI, like other CLECs including AT&T (AT&T at 221-24, 229-31), UNE-P "[r]ather than replacing facilities-based deployment, . . . encourages CLECs to deploy additional facilities in new markets." BTI at 11.[250]

The ILECs nevertheless claim that UNE-P deters CLECs from investing in their own facilities, and in particular claim that customers that CLECs serve initially via UNE-P will never be migrated to CLECs' own facilities. The asserted basis for this claim is that "AT&T and WorldCom's platform-dependent mass market strategy in New York – which has resulted in over a million residential customers – has apparently yet to produce a single customer converted to these carriers' own facilities." SBC at 77; BOC UNE Report at II-17; Letter From J. Bennett, SBC, to Marlene Dortch, FCC, Docket No. 01-338, at 10-11 (Apr. 29, 2002) (BOC Apr. 29 *Ex Parte*).

Once again, the ILECs' claims are belied by the CLECs' comments and their actual marketplace experiences. First, AT&T explained that it in fact has converted to its own facilities a substantial number of business customers that it initially served over ILEC facilities. *See* AT&T at 221 & Brenner Dec. ¶¶ 43-48. As AT&T described in its initial comments, where the economic and technical circumstances warrant it, AT&T plans to convert additional customers to its own facilities. *Id.* ¶¶ 47-51. However, its ability to do so depends upon several factors, including a satisfactory loop cutover process that does not pose a risk that customers will suffer service outages and provisioning delays, reasonable cost-based non-recurring charges for the loop cutovers, the attainment of sufficient volumes of customers in new areas to justify

[250] BTI at 11 ("Since CLECs are able to attract customers at a faster rate by virtue of UNE-P, CLECs are able to reach the economies of scale required to justify facilities-based investment at a faster pace than if UNE-P is not available . . . . UNE-P [thus] enables . . . facilities-based investment by CLECs").

investment in AT&T's own facilities, the availability of collocation at reasonable rates, and the cost effectiveness of backhauling traffic to AT&T's network, including the availability of unbundled dedicated transport and the absence of use and commingling restrictions on UNEs.[251] Lesher Reply Dec. ¶¶ 54-55. In most markets, many of these factors would make migrations impractical and uneconomic. For example, as described above, in many states, the price of the non-recurring charges that apply when AT&T attempts these migrations simply makes it uneconomic to transfer customers to AT&T's own facilities. Indeed, in some cases, the loop cutover NRCs are so high that they cannot be recovered over the average life of a customer account.

Similarly, Z-Tel's comments explain the severe limits in the ILECs' own loop cutover processes that substantially hinder CLECs from migrating UNE-P customers to their own facilities. Z-Tel states that it fully explored purchasing its own switch, and then beginning to migrate its over 100,000 UNE-P customers in the New York City area. Z-Tel at 38-43. Such migrations would occur on a "project management" basis, which, as described in AT&T's initial comments (AT&T at 221), is more efficient and reliable than the hot cut process, but substantially limits the number of customers that CLECs can convert from UNE-P to a CLEC's own switch.

As Z-Tel's affiant explains, a project cutover is performed for a batch of about 100 to 150 lines. Critically, however, Verizon can only perform one project per day (for the entire CLEC industry) in each of the roughly 40 areas that Verizon has divided the former NYNEX territory.

[251] With regard to backhaul costs, AT&T can generally achieve cost savings by handling the backhaul traffic over its own facilities, or "on net." However, as described above, AT&T and other CLECs are impaired in their ability to deploy such facilities because, for example, of problems in obtaining rights of way.

Z-Tel, Rubino Dec. ¶ 35.[252] Based on this information and Verizon's overall provisioning levels, Z-Tel estimates that Verizon could at most perform only about 4,000 migrations per month for Z-Tel (although Verizon was not able confirm even that figure), *id.* which was not nearly enough to service the level of churn that Z-Tel experiences on a monthly basis, let alone to convert rapidly all of Z-Tel's existing customers to a Z-Tel owned switch. Z-Tel at 40-41. Accordingly, Z-Tel concluded that the cost of these migrations, combined with the "length of time it would take us to migrate customers to our switch," would still present "significant and substantial barrier[s]" to its ability to use a switch in an efficient manner. Z-Tel, Rubino Dec. ¶ 34. Accordingly, Z-Tel still serves its New York customers with UNE-P.

As for AT&T's UNE-P residential customers, AT&T's Comments and the accompanying declaration of Stephen Huels explain AT&T's desire to convert certain residential customers to its own switching and the conditions under which that would be possible. *See* AT&T at 230-231 & Huels Dec. ¶¶ 65-68. Critically, AT&T's ability to make any such conversion expressly depends upon continued availability of UNE-P, along with other market and regulatory conditions, that would enable AT&T to build a sufficient base of customers and provide a bundle of *both* voice and data services, which is needed to provide the economic basis to serve residential customers with AT&T circuit switching.[253] Removal of UNE-P would not mean that

[252] Thus, for example, if Z-Tel has scheduled a cutover for a particular day in a particular area, AT&T could not schedule a project cutover in that area for the same day. Z-Tel, Rubino Dec. ¶¶ 35, 37. Moreover, Verizon also informed Z-Tel that no hot cuts can be performed in the central office where a project is scheduled to occur either five days before or five days after the project cutover. *Id.*

[253] AT&T's data services would in all cases be provided through the use of AT&T's own packet switching.

these customers would be converted to AT&T's own facilities. Rather, it would simply prevent AT&T from serving residential customers at all.

In sum, denying CLECs access to UNE-P would not, as the ILECs claim, encourage CLECs to deploy more switches; rather it would have the perverse effect of discouraging further investment in CLECs' own switching equipment. As a result, the expected result of a significant contraction in the availability of unbundled local switching and UNE-P would be less competition *on all fronts* and even greater consolidation of the ILECs' enormous market power.

4. The Commission should heed the States' Unanimous Call to Retain the Competitive Benefits of UNE-P

The strong support for UNE-P comes not only from CLECs that are "facilities-based provider[s]" that wish to use UNE-P in conjunction with their own "switching platform." NewSouth at 21.[254] Critically, it also comes just as powerfully from State commissions that "share[] the Commission's goal of encouraging facilities-based competition," New York at 3.[255] These State commissions, who have been at the front lines watching and encouraging the development of competition in their jurisdictions, recognize that "an unrestricted switching UNE" and UNE-P "at TELRIC rates" is "essential to the further development of competition." Louisiana at 2; *see also* California at 20 ("California urges the FCC to retain [an] unbundl[ed switching] requirement in order to enable non-facilities-based CLECs to have access to the UNE-platform"); NARUC UNE-P Resolution. Thus, CLECs and State commissions all

[254] *E.g.*, BTI at 5 ("UNE-P has been a valuable resource allowing BTI to continue with its expansion plans and the eventual installation of facilities"); GCI at 48; Eschelon at 11.

[255] *See also* Louisiana at 2; New York at 3; California at iii, 9-10; Georgia at 4-5; Indiana at 9; Illinois at 2-3; Massachusetts at 4; Missouri at 7-9; Texas PUC at 4.

recognize that UNE-P is needed at least "until CLECs can migrate large volumes of customers to their own switches more efficiently." New York at 3; *see also* Z-Tel at 3.

Most significantly, the Texas and the New York commissions – the two State commissions that have been at the forefront of developing pro-competitive rules to open local markets to competition and that preside over local markets that have seen the most competitive entry to date – recently issued orders finding that unbundled switching and UNE-P should be made available to competing carriers to serve *any* mass-market customer.[256] And, unlike the Commission's existing switch carve-out rule, these State commissions have broadly defined mass-market customers. *NYPSC UNE-P Order* at 31 (finding that joint plan, which provided for "enhancements" to the availability of UNE-P so as to allow its use to serve residential customers and small business customers – defined as customers with 18 lines or less at any location – "will enable CLECs to continue to compete in New York").

The decision of the Texas commission – issued in its capacity as arbitrators of an interconnection agreement – is particularly noteworthy. The Texas commission found that "CLECs are impaired without access to local switching" and that SBC is "required to provide unbundled local switching . . . . throughout Texas *without exception*." *Texas UNE-P Order* at 64-65 (emphasis added). This "independent[] find[ing]," which was based on a detailed and "specific factual record," considered "each of the factors specified in 47 C.F.R. § 51.317" that this Commission has required in conducting an impairment analysis. *Id.* at 69-70. Specifically, the Texas PUC concluded that

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[256] *See Texas UNE-P Order*; Order Instituting Verizon Incentive Plan, *Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework*, Case 00-C-1945 (N.Y. PSC, issued Feb. 27, 2002) ("*NYPSC UNE-P Order*").

> fixed infrastructure costs – including the switch itself, electronic interfaces, collocation arrangements, provisioning, and cutovers – associated with providing service to residential and small business customers remain a barrier to market entry unless the CLEC is able to generate sufficient economies of scale in a given market. . . . [and CLECs are impaired without access to unbundled switching because] the delay and expense associated with deploying facilities and capturing a significant scale of customers using their own facilities remains a time-consuming process for CLECs that takes years." *Id.* at 70.

Based on these specific findings, the Texas commission concluded that unbundled switching and UNE-P should be available to CLECs. In particular, at least in the short run, the Texas PUC found "compelling the evidence that UNE-P is the *only viable market entry mechanism* that readily scales to varying sized exchanges to serve the mass market, while minimizing capital outlays and permitting a CLEC to gain a foothold. In particular, UNE-P is the only viable option for providing competitive analog [voice-grade] local service to small business customers." *Id.* at 84-85 (emphasis added). Unlike resale, "UNE-P provides CLECs with a meaningful opportunity to differentiate their products and services to consumers," and "will also facilitate CLEC creation of innovative product offerings," which "continues the benefit of customer choice in service providers and service packaging to a large geographic segment of the population." *Id.* at 85. The Texas PUC therefore concluded that "it is in the public interest for SWBT to continue to unbundle its local switches regardless of the geographic area or density zone." *Id.*; *see id.* at 86 (determining that "local switching is a vital part of UNE-P, which [is] in turn an effective vehicle for bringing consumers immediate and long-term benefits of geographically broad-based competition").

Moreover, the Texas commission determined that UNE-P should be available to all mass-market customers, and was unwilling to "adopt a mass market definition that . . . might place the vast majority of Texas business customers' lines outside of that definition, and therefore outside the benefits afforded by ULS." *Id.* Texas found the Commission's existing switch carve-out

was inappropriate in Texas, noting that this Commission had "conceded" that the 3-line carve-out could "fail to accurately draw the distinction between the mass-market" and larger business customers and finding, in fact, that the 3-line rule did not provide an "accurate or practicable" measure of the "mass-market" in Texas. *Id.* at 67. Instead, the Texas commission determined "local switching [should] be made available as a UNE in all zones in Texas, *without restriction*." *Id.* at 85 (emphasis added).

The State commissions' unanimous support for the broad availability of unbundled local switching and UNE-P is the strongest evidence that impartial pro-competition and pro-consumer agencies across the country have found that – even in the largest States with the greatest amount of existing competition – UNE-P remains a vital tool necessary to implement the pro-competitive goals of the Act. Thus, in order for the Commission to remain "current and faithful to the procompetitive, market-opening provisions" of the 1996 Act (*Notice* ¶ 1), it should heed the States' unanimous call to make UNE-P available on an unrestricted basis, to serve all customer locations that require use of voice-grade loops.

E. ILEC Claims Regarding CLEC Switch Deployment Are Overstated And Do Not Rebut The CLECs' Clear Evidence That They Are Impaired Without Access To Unbundled Local Switching To Serve Low-Volume Customer Locations.

The ILECs' attempts to remove local switching as an unbundled element are largely a warmed-over version of the same claims that the Commission properly rejected in 1999. As the Commission recognized, the ILECs' claims fail to respond to the specific impairments identified above – even as applied under the unnecessarily narrow strictures of *USTA*. Although the ILECs purport to rely on an array of "marketplace facts," the ILECs fail to examine the critical "marketplace" distinction between low-volume and high-volume customer locations, a distinction that the Commission properly found significant (but drew imprecisely) in 1999. *See*

UNE Remand Order ¶ 255. The facts that the ILECs tout – that some CLECs have deployed switches, that some CLECs have won some customers, and that some consumers use wireless or packet-based services in certain circumstances – are all largely overstated and ultimately irrelevant to the central question here, *i.e.*, whether CLECs can practically, efficiently, and effectively use their own switches to serve low-volume customer locations.

1. ILEC Claims Regarding Competitive Switch Deployment Ignore the CLECs' Actual Impairment Analysis and are Misleading and Inflated

The ILECs' principal claim is based on CLECs' deployment of switches. Although the ILECs themselves have about 23,000 switches to serve their customers,[257] they would have the Commission conclusively find that, because CLECs have deployed 600 switches since 1999 (and 1300 switches in total), SBC at 67-70; BellSouth at 78-79; Qwest at 21; Verizon at 21; ILEC Report at II-1, CLECs would not be impaired even if they had no access at all to local switching. SBC at 74-75; Verizon at 102; Shelanski Dec. ¶¶ 49, 51.

These claims are entirely without merit, for they fail to address the most relevant issue: whether a CLEC can *use* its own deployed switch and in fact serve customers efficiently. Indeed, AT&T and other CLECs have clearly demonstrated that CLEC switches *cannot* be used to serve the mass-market – broadly defined to include any customer location served with voice-grade loops. *See supra* Part I. The Commission arrived at this same conclusion in 1999 (rejecting the same ILEC claims), and the ILECs provide no valid reason why that should change today. *See UNE Remand Order* ¶¶ 254-55 (citing ILEC data that "a significant number of competitive switches have been deployed," but concluding that, although competing carriers can

[257] See ARMIS data for the former RBOCs, GTE and SNET, contained in 43-07 Report, Table 1 for 2001. The total is comprised of 14,056 local switches, 2,245 host switches, and 7,052 stand-alone remotes.

"serv[e] certain customer classes in certain geographic markets" with these switches, they "are impaired in their ability to provide service in most markets"). In this regard, the ILECs' updated switch count data is no more convincing today. The Commission also noted that the number of switches deployed in 1999 represented "only a small fraction of the number of switches" the ILECs have deployed. *Id.* ¶ 254. Even taking the ILECs' new switch data at face value, the number of CLEC switches is *still* only a small fraction of the ILEC switches, and does not demonstrate that CLECs are able to use those switches to serve the majority of customer locations.

Critically, nothing in *USTA* requires a different result. While the court found that the Commission should explain why an element should be unbundled when it "is significantly deployed on a competitive basis," *USTA*, 290 F.3d at 422, the court's decision does not at all imply that the Commission's unbundling analysis should consider only evidence of competitors' ability to deploy a certain element. To the contrary, the court also made clear that the Commission should also examine the impact of unbundling on "specific markets or market categories." *Id.* at 426. Thus, if an element is deployed, but cannot in fact be used to serve a particular market category – as is the case with switches and low-volume customer locations – then the *USTA* court's analysis fully supports unbundling the element to serve the identified "customer class." Indeed, any more restrictive reading of the *USTA* decision would be nonsensical, and would directly contradict the Supreme Court's holding that the Commission should interpret the Act's unbundling obligations to "get[] a practical result." *Verizon*, 122 S. Ct. at 1683. The Commission would violate the Act and the Supreme Court's ruling if it refused to unbundle switching merely because switches have been deployed, even though they practically cannot be used to serve the majority of customers.

The record here only reinforces those conclusions. AT&T has shown that it has deployed over one hundred switches in local markets, but nonetheless serves only a very small percentage of voice-grade loops using those switches. AT&T at 219. And although AT&T has continued to deploy local switches at a modest rate, its sworn testimony explains that it uses those switches almost exclusively to provide services to large businesses with intense demand for telecommunications services. AT&T at 207-09 & Brenner Dec. ¶¶ 24-29; *see also* Z-Tel at 48-50 ("The fact that some CLECs have deployed switches to serve the large business market or broadband market does not support the conclusion that CLECs are not impaired without access to unbundled switching to serve the mass market"). Thus, the mere switch count offered by the ILECs is not a valid indication of AT&T's (or any other CLEC's) ability to those switches to serve the mass-market generally. *See* CompTel at 62-63.

These figures are reinforced by data compiled by a coalition of CLECs that examine CLECs' operations in six representative markets. *See* CCG Consulting, Inc., "State of CLEC Competition" ("CLEC Coalition Report"). The data show that about *90 percent* of the loops used by CLECs in these markets are DS-1 capacity or higher. *Id.* Table 4. Thus, of the 1.7 million voice-grade equivalents served by CLECs, only 10 percent, or 180,000, were voice-grade loops. *Id.* Significantly, the *only* market which diverged significantly from this collective pattern was Albany, New York – where UNE-P has practically been available to CLECs to serve many customer locations that require voice-grade loops. *Id.* In Albany, about 60 percent of the VGEs that CLECs serve are voice-grade lines, *id.*, which demonstrates that UNE-P provides the only currently viable mechanism for CLECs to access customers served by voice-grade loops. Notably, CLECs have deployed switches in these markets, but they are plainly not using them to

serve voice-grade loops.[258] In Chicago, for example, CLECs in the coalition reported deploying 15 switches, yet they served only about 80,000 voice-grade loops with those switches – less than 10 percent of their total VGEs. *Id.* p. 2, Table 4. Thus, the data collected by this CLEC coalition also demonstrates that CLECs are deploying switches to serve high volume customer locations that require DS-1 or higher loop connectivity. They cannot *and are not* using those switches to serve voice-grade loops. UNE-P is the only way CLECs can serve such loops.

In fact, the evidence in the record here shows that CLECs would be deploying even more switches if they could in fact effectively use them to serve the mass-market. Z-Tel explains that it had the opportunity to purchase an already-deployed switch at a "bargain" price of about a fifth of the ordinary cost. Z-Tel at 34. But after closely examining the business case, Z-Tel concluded that it would not purchase the switch – indeed would not even accept it for free – because the impairments described above meant that it could not practically use the switch to provide service to the mass-market customers that Z-Tel largely serves. *Id.* at 35-36. As these examples and the discussion in Part IX.B above show, switches have little value in serving low-volume customer locations, because those customers' voice-grade loops cannot be economically, reliably or easily connected to those switches. These are the exact reasons why the Texas PUC flatly rejected the very claims the ILECs make here and refused to find that "the sole standard for removing unbundled switching is the ability of CLECs to self-supply switching." *Texas UNE-P Order* at 68-69.

[258] And it is important to note that the availability of UNE-P in Albany has not deterred CLECs from deploying facilities there: the coalition CLECs deployed 5 switches in Albany, a market measured to have about 560,000 voice access lines. *Id.* Table 1. By comparison, in Portland, Oregon, a market that includes about 760,000 access lines (and where UNE-P is not practically available), the coalition CLECs have deployed 7 switches. *Id.* Thus, the level of switch deployment is about equivalent in both markets.

In all events, the ILECs' switch count data are misleading and often simply inaccurate, for several reasons. First, a substantial number of the switches deployed by CLECs have been deployed by CLECs that seek to use UNE-P to serve certain customer segments. Pfau Reply Dec. ¶¶ 11, 17-22. This fact fully supports the view that availability of UNE-P supports deployment of facilities, and does not deter it, as the ILECs claim. *Id.* ¶¶ 10, 15.

Second, the ILECs' switch count includes hundreds of switches that were only deployed to serve particular market segments. For example, it includes many of AT&T's long distance switches, which, as AT&T described, are not and *cannot* be engineered to provide service to customers that do not have a sophisticated PBX and that use high-capacity loops. Brenner Dec. ¶ 28. Because of these technical limitations, it is blatantly improper to rely on these switches to support a claim that CLECs could provide local services to mass-market customers.

Further, as described in the declaration of C. Michael Pfau, a detailed examination of the ILEC switch data in fact *supports* the view that it is not economic or practical to deploy switches to serve the mass market. Pfau Reply Dec. ¶¶ 11, 17-22. It is evident that many CLEC-deployed switches are being operated to serve exclusively business customers, particularly business customers with intense demand for telecommunications services and that do not rely on voice-grade loops. *Id.* ¶¶ 20-21. In addition, over 250 switches (nearly 20 percent of the total) included by the ILECs' count were deployed by entities that are now bankrupt. *Id.* ¶ 18. If CLECs could practically and economically deploy *and use* their own switches to serve the low-volume locations that require voice-grade loops, then it is reasonable to expect that CLECs pursuing such a pure facilities-based strategy would be less likely to be in bankruptcy. *Id.* ¶ 19. In fact, the opposite is true: virtually all of the 200 switches that are now owned by bankrupt entities were deployed by "pure" facilities-based CLECs. *Id.* Indeed, the fact that over 250

switches were deployed by bankrupt entities demonstrates, at a minimum, that the ILEC switch count is misleading. Counting a switch deployed by a bankrupt CLEC does *not* support a claim that it was used to provide *any* service profitably, and thus in a competitively sustainable manner, especially for mass-market customers. *See UNE Remand Order* ¶ 256; CompTel at 71-73.

Perhaps in recognition of these facts, the ILECs also argue that the geographic reach of a switch is large and that CLECs have deployed their switches within wire centers that serve the majority of the ILECs' access lines. SBC at 68-69, ILEC Report at II-8-12; Verizon at 96; BellSouth at 82-83. Although they do not say so directly, the ILECs appear to claim that, even if CLECs are not serving certain market segments with their own switches, it would be technically feasible to do so.

But claims of mere technical feasibility are simply irrelevant here. It is undisputed that, as an engineering matter, a switch can serve a geographically broad area. *See UNE Remand Order* ¶ 261 ("We recognize that switches deployed by competitive LECs may be able to serve a larger geographic area"). Critically, however, the evidence squarely refutes the ILECs' follow-on argument (*see, e.g.*, ILEC Report at II-7-8) that, "once a [competing] carrier incurs the costs to deploy a switch, it can economically extend the reach of that switch to serve broader markets." *See UNE Remand Order* ¶ 261. This argument completely ignores all of the CLECs' showings above regarding the practical difficulties in connecting voice-grade loops to a CLEC switch, because of hot cut problems, the transport and collocation-based costs that limit the economic reach of a CLEC switch, and the inability to access DLC loops. *See, e.g., UNE Remand Order* ¶ 261 (finding that CLECs cannot "fully exploi[t]" the broad geographic range of a switch because of, *inter alia*, "distance-sensitive transport costs, and collocation costs"). Indeed, with

regard to transport costs, the ILECs admitted this very point in 1999, conceding that "[t]he *effective* footprint of a switch ultimately depends on how much it costs to haul traffic from distant points to that switch." *See* AT&T 1999 Reply Comments at 97 (quoting 1999 ILEC Report at I-25); *see also id.* (quoting Ameritech affiant that for CLECs that "make value-based decisions" about "extending transport and switching facilities. . . . [t]wo important factors" in those decisions are "the distances of transport necessary to connect wire centers and the amounts of access lines and revenues that a CLEC can gather at the ILEC's wire centers"). Accordingly, data showing the mere technical reach of a switch do not refute the overwhelming evidence that CLECs are impaired in using a switch to "get[] a practical result" necessary to serve the vast majority of customer locations requiring only voice-grade loops. *Verizon*, 122 S. Ct. at 1683.

For similar reasons, the ILECs' data regarding NXX counts and ported numbers are also misleading. The ILECs rely on these data to claim that CLECs' switches have broad reach and are in fact serving customers in widespread areas. However, the ILECs' data – like the other data provided by the ILECs – say nothing about the *types* of customers that CLECs are serving. Pfau Reply Dec. ¶ 33. Accordingly, these data do not refute the specific showing that AT&T and other CLECs have made that they cannot use their own switches to serve low demand customer locations.

Moreover, the data on number portability and NXX counts offered by the ILECs, even if taken at face value, hardly demonstrates that local markets are robustly competitive, as the ILECs assert. For example, according to the data in the ILECs' Table 4, 47% of wire centers have had telephone numbers ported to 1 or more CLEC switch, 34% to 2 or more, 28% to 3 or more, and 24% to 4 or more. ILEC Report, Table 4. Ultimately, these data are unimpressive and, if anything, show that local competition remains extremely limited. Pfau Reply Dec. ¶ 34.

Merely changing the ILECs' phrasing shows that 53% of wire centers have *no* alternative provider and another 13% have merely 1 alternative provider – meaning two-thirds of wire centers face limited competition, and half face none. *Id.* Even then, in the 47% of the offices where a number port has occurred, that evidence could indicate merely that a single, communications intense customer is being served.

2. ILEC Estimates of Line Counts are not Credible and are Refuted by the Commission's Own Data

The ILECs also assert that CLECs cannot be impaired without access to unbundled switching because CLECs are serving millions of customers using their own switches. SBC at 69; Verizon at 96. According to the ILECs' "estimates," CLECs are serving between 16 and 23 million lines with their own switches, figures that they claim are "highly conservative." Qwest at 22 & n.41; *see* SBC at 69-70 & n.91. These numbers are simply not credible and they are flatly inconsistent with data collected by the Commission for the express purpose of determining the extent of local competition. But more fundamentally, the ILECs' estimates of lines served by CLEC switches do not contradict the CLECs' *specific* showings of impairment and that have been recognized and validated by State commissions. In particular, CLECs are *not* serving low volume customer locations with their own switches, and the ILEC estimates do not demonstrate otherwise.

As described above, the ILECs derive their estimate of lines provided over CLEC switches from two sources: information derived from E911 databases and estimates derived from interconnection trunks. *See* ILEC Report at A-2, A-3. Neither of these sources is a reliable mechanism to estimate the number of lines provided over CLEC switches. *See infra* Part VI.B.3; Pfau Reply Dec. ¶¶ 23-31; Lancaster-Morgenstern Reply Dec. ¶¶ 8-16.

The only evidence that the ILECs offer that even arguably addresses the CLECs' ability to use their own switches to serve the mass-market is their estimate that CLECs serve 3 million residential lines with their own switches.[259] Even at face value, this shows that all competitors, *including* cable providers, have managed to provide switch-based service to only about 3 percent of all of the residential lines in the country. Pfau Reply Dec. ¶ 29. But the ILECs' figure, which is drawn from the 911 databases, is inherently unreliable for all of the reasons described above.

Moreover, as the Pfau Reply Declaration describes, even if the ILECs' dubious figure of "approximately" 3 million switch-based residential customers is correct, most and probably nearly all of the residential customers receiving switch-based local service are cable telephony subscribers. Pfau Reply Dec. ¶¶ 30-31. As a starting point, the ILECs themselves concede this figure includes 1.5 million cable lines, which lowers by half the purported number of lines that other CLECs provide to residences. In fact, the number of lines served by cable operators is likely much greater than 1.5 million, and is probably comes close to capturing virtually of the purported residential subscribers receiving switch-based service from CLECs. *See id.*

Notably, no non-cable CLEC commenter claims that it provides significant amounts of residential switch-based service. And if any CLECs do provide such service, it is most likely to MDUs, which usually can be served using high-capacity facilities that avoid the impairments associated with individual low-volume customer locations. Pfau Reply Dec. ¶ 31. Thus, the

[259] The only other evidence on this issue in the ILEC Report is a two-page chart of various press statements issued by CLECs – some nearly three years old – that indicates that some CLECs (many of them cable companies, or ILECs acting as "edge-out" CLECs) had plans to serve residential customers using their own facilities. ILEC Report at II-12 to II-13 & M-9. Unless and until those plans turn into actual customers, this does not disprove the CLECs' overwhelming showing of impairment. Pfau Reply Dec. ¶ 32

ILECs provide no credible evidence that non-cable CLECs are providing switch-based local service to a significant number of mass-market customers.

The Commission's Reporting Data. The actual number of lines served by CLECs over their own switches is much smaller than either of the outlandish figures cited by the ILECs. The best evidence refuting those figures is provided in the Commission's own data on local competition – which the ILECs largely choose to overlook. The Commission's data show that competitors are, at best, serving only about half as many customers as the ILECs claim over CLEC switches. The most recent report shows that CLECs serve just over 17 million lines *in total*, and that between 4 or 4.4 million of those lines are provided by resale and another 4.75 million are provided by UNE-P. *See* Local Competition Report, Feb. 27 ,2002, at Table 3, Table 4. These data – which are collected by the Commission under a specific methodology for the express purpose of measuring local competition – make it easy to determine that CLECs serve no more than 8.25 million lines (about 4 percent of the total 192 million lines in the country) over their own switches – and, based on AT&T's internal figures and the CLEC Coalition Report, it is undoubtedly the case that almost all of these 8.25 million lines are communications intense business locations. In sum, there is no reason for the Commission to trust the ILECs' tortured and complex estimates of CLECs lines served as opposed to the data that the Commission collects for this very purpose.

Thus, regardless of the *overall* level of lines provided over CLECs' switches, that figure could in no way by itself contradict the *specific* showing that AT&T and other CLECs have

made that they are impaired in using their own switches to serve low volume users that represent the vast majority of all business and residential consumers' locations.[260]

3. Competition from Packet and Wireless Switches is Insignificant.

Finally, the ILECs point to the increased use of packet-switched services, such as internet electronic mail, and to growth in wireless services. *See* SBC at 71; Verizon at 97-98; Qwest at 29-30; ILEC Report at II-20 to II-30. According to the ILECs, this growth has been significant enough that end users increasingly substitute packet-based and wireless services for ILEC services, which "plac[es] significant, additional pressure on ILECs' traditional circuit switches." ILEC Report at II-2.

These data also do not refute the CLECs' detailed impairment showing with regard to low-volume customer locations because neither wireless nor packet-based services are a true substitute for wireline telephone services. Notably, even the ILECs do not contend that CLECs could easily compete – and thus would not be impaired – if they became wireless carriers or offered only an array of packet-based services. Even the ILECs' own data demonstrate that these services – at best – displace a tiny portion of the ILECs' landline monopolies. And because of technological limitations on these services, there is no reason to believe that they will act as true substitutes for the ILECs' wireline service any time soon. And at best these considerations merely explain suppression of existing and new second line demand for the incumbents.

[260] The figures that AT&T has reported to the Commission and discussed in its initial comments (at 217-19) prove the point: those figures show that AT&T serves millions of voice-grade equivalents, the customers AT&T serves with its own switches are either cable telephony customers or businesses with intense demand for telecommunications that require at least a DS-1 capacity loop. *Id.* AT&T's experience, like that of other CLECs, is that it cannot serve low volume customer locations with its own switches. Indeed, only a very small fraction of its total local lines are served in this fashion. *Id.*

The ILECs' claims are also entirely without merit because they once again point to the CLECs' *deployment* of packet switches and packet-based networks, but ignore how CLECs in fact are *using* those switches and networks.[261] As explained in the declaration of Larry A. Russell, in today's networks, packet switches are used to *complement* existing circuit switch networks, not to replace them. Russell Reply Dec. ¶ 7. In particular, packet switches are not designed to provide the full suite of features that consumers demand from voice services. *Id.* ¶¶ 7, 10-15. Carriers therefore can only use packet switches to provide certain functions, and must rely on circuit switches and other equipment to provide all of the advanced features that are currently available through the unbundled local switching functionality. *Id.* ¶ 10. To be sure, packet switch technology holds great promise for the future. However, the issue here is whether CLECs can use non-ILEC packet switches *today*, without impairment, as a substitute for access to ILECs unbundled local switching functionality. The answer to that question is that they unequivocally cannot. *Id.* ¶¶ 9-18.

Similarly the ILECs' own data, as well as those of wireless commenters, demonstrate that only a very small fraction of *wireless* users – no more than 3 percent – have replaced their wireline phones with wireless phones. *See* ILEC Report at II-37; AT&T Wireless at 4; *cf.* WorldCom at 37 ("only 2.2% of all wireless customers use wireless phones as their only phones"). Because only a portion of end users subscribe to wireless services, the percentage of *all* telecommunications customers (which is the relevant group for unbundling purposes) that

[261] Deployment of packet switches has increased, but even the ILECs' own data show that data services handled over CLECs' packet switches, such as broadband cable or wireless data, displace just "4 percent" of all circuit-switched traffic. ILEC Report at II-20. And for voice services, the fact that a small percentage of telephone voice traffic has been reduced by competing technologies like instant messaging or e-mail is irrelevant to the impairment analysis, because CLECs cannot compete against the ILECs' voice monopolies by becoming ISPs.

have replaced their wireline phone with a wireless phone is just a fraction of the figure for wireless users. In fact, the ILEC Report's identified source for the wireless displacement (IDC, *Wireless Displacement of Wireline Forecast and Analysis, 2001-2005* (2001)) states that the rate of primary line displacement is expected to *peak* in 2002 in the range of 2.2% and then to decline to approximately *half* that rate by 2005 (*id.*, Figure 11). Indeed, overall wireless displacement of wireline service has steadily declined and, in 2001 reached its lowest level since the passage of the Act (*id.*, Figure 7).

Further, there remain a number of material cost and quality differences between landline and cellular services that inhibit end users from substituting wireless for wireline services. For example, wireless phones have higher blocking rates and less ubiquitous coverage, require the user to pay for incoming as well as outgoing calls, cannot support multiple users over the same line, and have more limited ability to access data services. For all these reasons, the Commission correctly concluded in 1998 that wireless services were generally complements, not substitutes, for wireline services, *Second Louisiana 271 Order* ¶ 33, and that conclusion remains true today.

F. Electronic Loop Provisioning Must Precede Any Consideration Of The Future De-Listing Of Local Switching

Finally, given the overwhelming support of the CLEC industry and State commissions, the Commission should find that there is no basis to de-list unbundled local switching in the future until an incumbent has implemented an *electronic* process for transferring customer loops that overcomes the significant hot cut and DLC problems all CLECs face in attempting to use their own switches to serve voice-grade loops. *See Notice* ¶ 46; AT&T at 235-39; WorldCom at 86. The Commission and the Department of Justice have long recognized that manual operations support processes are insufficient to match the efficiencies the ILECs enjoy for themselves from automated provisioning processes. *E.g.*, *Michigan 271 Order* ¶ 172; *South Carolina 271 Order*

¶ 107; *Second Louisiana 271 Order* ¶ 96. The Commission's successful experience with long distance competition also teaches that, without an efficiently functioning automated loop provisioning for mass-market customers, there is simply no likelihood that CLECs could access their customers' loops and operate their switches efficiently. Nor is there any likelihood that a competitive market for unbundled switching could develop, so that the "market" price for unbundled switching approximates properly set TELRIC rates. Both of these developments are necessary before the Commission can reasonably deregulate CLEC access to local switching for the vast majority of consumers in the mass-market.[262]

X. THE COMMENTS CONFIRM THAT THE COMMISSION SHOULD CONTINUE TO REQUIRE ACCESS TO OSS, SHARED TRANSPORT, SIGNALING AND CALL-RELATED DATABASES.

Finally, the remaining elements on the national list, OSS, shared transport, signaling and call related databases should be retained as UNEs. Not even the ILECs challenge OSS as an

[262] The Commission clearly has the authority to require ILECs to implement an electronic loop provisioning process to support the development of local competition, just as it required the ILECs to implement an automated PIC selection process to support long distance competition. *See, e.g.*, *MTS WATS Market Structure, Phase III*, 50 FR 15547-01 (Apr. 19, 1985) (ordering all Tier One incumbent local exchange carriers to make extensive and expensive modifications to their end office switches so that they could provide 1+ "trunkside" access to all IXCs and offer low cost electronic means of switching a customer's service from one IXC to another); Memorandum Op. and Order on Recon., *Matter of Provision of Access for 800 Service*, 6 FCC Rcd. 5421, ¶ 29 (1991) (compelling the BOCs to construct and deploy databases that would permit 800 number portability and foster competition in this market); *Virtual Collocation Order*, 9 FCC Rcd. 5154, ¶ 25 (1994) (requiring ILECs to "purchase or lease [particular kinds of] equipment" requested by the competitive access providers (CAPs) and "install, maintain, and repair this equipment . . . in their central offices," so that CAPs could interconnect through it); *Collocation Remand Order* ¶ 68 (ordering the ILECs to provide cross connects to competitive carriers). If the Commission elects not to require the ILECs to implement such processes to support competition for low volume customers, however, it should make clear that it would not entertain any request to de-list the availability of unbundled local switching (and UNE-P) for customers served by voice grade loops unless and until such a capability is actually in place for the affected customers, and there is evidence of the development of a competitive market for local switching at efficient process.

element because OSS is a necessary pre-requisite for obtaining every other network element. Likewise, while the ILECs mount a token attack against shared transport, signaling and call-related databases, the evidence overwhelmingly demonstrates that CLECs would be impaired without access to these network functionalities.

A. The Commission Must Retain Shared Transport As An Unbundled Element.

USTA does not call into question (or even reference) the Commission's repeated findings that new entrants would be impaired in their ability to offer service without access to the incumbent's unbundled shared transport.[263] Indeed, the natural monopoly characteristics of shared transport are so obvious, that only Ameritech offered any significant opposition to the availability of that element in the *UNE Remand* proceeding,[264] and no party appealed the Commission's decision to require the unbundling of shared transport in that proceeding.

As described above, dedicated transport has huge fixed costs and substantial scale economies. Thus, it is economically feasible for CLECs to self-deploy dedicated transport in only the handful of instances where they have been able to aggregate enormous demand. Otherwise, the CLEC will be paying the huge fixed costs for a substantial amount of capacity,[265] but only utilizing a fraction of it. And even where these economic conditions are met, the CLEC must be able to secure timely the necessary rights of way. For the reasons provided above, and

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[263] *See UNE Remand Order* ¶¶ 369-79; *Shared Transport Order* ¶¶ 19-52; *Bell Atlantic-NYNEX Merger Order* ¶ 190.

[264] As the Commission recognized, most of Ameritech's arguments had already been rejected by the Eighth Circuit. *See UNE Remand Order* ¶¶ 371-72, 377-78; *Southwestern Bell Tel. Cos. v. FCC*, 153 F.3d 597 (8th Cir. 1998) (upholding shared transport).

[265] As explained, all new transport facilities are fiber optic facilities that typically provide OC-12 bandwidth or greater.

in AT&T's initial comments, these conditions are rarely met and CLECs are impaired without access to ILEC dedicated transport facilities.

Thus, any claim that CLECs would not be impaired without access to shared transport must proceed from the assumption that leased dedicated transport can be substituted. Again, because of the natural monopoly characteristics of transmission facilities, that is not the case.

As its name makes clear, when a CLEC leases dedicated transport it is purchasing capacity that is dedicated to the CLEC. Thus, the CLEC pays the same amount whether it uses, or does not use, the capacity. In contrast, when a CLEC uses a shared transport UNE, its traffic is co-mingled with the ILECs' traffic (and the traffic of other CLECs). While more expensive on a per unit of capacity basis, shared transport allows a CLEC to avoid having to incur a fixed charge for a dedicated amount of capacity.

Access to shared transport it critical for new entrants seeking to enter local markets. By definition, new entrants start with a small market presence. If forced to purchase dedicated transport, they would typically be forced to purchase more capacity than they need, and such capacity would lay fallow because they do not have the steady traffic volumes necessary to keep it filled. Thus, the Commission recognized that "when used in conjunction with unbundled switching, requesting carriers may find it economical to serve the small business and residential markets using shared transport because these market segments may not always support traffic volumes that justify using dedicated transport services." *UNE Remand Order* ¶ 379. Further, CLECs with small market shares generally cannot forecast their interoffice traffic volumes accurately. *Id.* ¶ 375. As a result, if new entrants were required to rely only on dedicated transport, they would inevitably purchase too much or too little dedicated transport capacity, depending on the individual route. Thus, the Commission's prior finding that a rule forcing

CLECs to rely on dedicated transport would "materially increase the costs and decrease the quality of services the requesting carrier could provide, and would materially limit the carrier's ability to serve a broad base of customers" (*id.* ¶ 374), is soundly based on the basic technical and economic characteristics of transmission facilities.

The availability of shared transport is also crucial to enable CLECs to provide a quality of service comparable to the ILECs. The Commission has twice found that shared transport is necessary to enable CLECs "to handle traffic at peak loads and maintain call blockage levels that are at parity with those of the incumbent LECs." *See UNE Remand Order* ¶ 378; *Shared Transport Order* ¶ 51. As the Commission has explained, "a new entrant entering the local market with smaller traffic volumes would have to maintain greater excess transport capacity relative to the ILEC in order to provide the same level of service quality (*i.e.*, same level of successful call completion) as the incumbent LEC." *UNE Remand Order* ¶ 378. A requesting carrier would therefore be impaired in its ability to offer service without shared transport, because otherwise it would be forced "to choose between purchasing excess capacity or incurring increased call blockage rates." *Id.*[266]

Finally, the *UNE Remand Order*'s finding of impairment is fully consistent with *USTA* because it was also based on an economic analysis of entry barriers into the local exchange business. The Commission has recognized that forcing new entrants to rely on dedicated transport would force new entrants to incur non-recurring charges ("NRCs") every time they purchase additional transport capacity. NRCs are a textbook barrier to entry, because they are charges that the CLEC incurs but the ILEC does not. George J. Stigler, THE ORGANIZATION OF

[266] Shared transport also permits the ILEC to share capacity most efficiently with the CLEC and to continue using and generating revenues from its own, existing interoffice facilities.

INDUSTRY 67 (1968) (an entry barrier is "a cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry."); *see also Bell Atlantic-NYNEX Merger Order* ¶ 129 (same). Shared transport, by contrast, allows the requesting carrier to purchase access to "the entire capacity of the incumbent LEC's network and [thus avoid] non-recurring charges for additional increments of dedicated transport capacity." *UNE Remand Order* ¶ 376. And critically, as the Commission found, requesting carriers must also incur "significantly higher recurring, per-minute costs to substitute dedicated transport for shared transport arrangements at low volumes." *Id.*; *see also Shared Transport Order* ¶ 35 ("requiring carriers to use dedicated transport facilities during the initial stages of competition would create a significant barrier to entry because dedicated transport is not economically feasible at low penetration rates"). Thus, unbundling of shared transport is appropriate because the "relative costs of dedicated transport, including the associated [non-recurring] costs," would constitute a classic "barrier to entry." *UNE Remand Order* ¶ 376; *Shared Transport Order* ¶ 50.

In sum, the Commission's findings in the *UNE Remand Order* are fully consistent with *USTA*. CLECs have no economies of scale and would suffer the same dramatic cost and quality disadvantages if they were forced to rely exclusively on dedicated transport. With low market share, CLECs also cannot forecast traffic volumes accurately. As a result, and thus they would be forced to order inefficient levels of dedicated transport, which would materially harm their ability to offer service. And forcing CLECs with low traffic volumes to purchase dedicated transport would require CLECs to incur hefty NRCs that constitute an additional a barrier to entry. The availability of shared transport, which enables CLECs to route their traffic through the most efficient trunking group available, using the same algorithms the ILECs uses for their

own traffic, thus remains essential to support local competition. *See UNE Remand Order* ¶ 375. Accordingly, shared transport should remain available as an unbundled network element.

B. The Commission Must Retain Signaling And Call-Related Databases As Unbundled Elements.

The comments confirm that the Commission should continue to require access to unbundled signaling networks and call-related databases whenever a CLEC is using the incumbent's unbundled switch. Although the ILECs argue that switching should be de-listed, no party, including the ILECs, argues that CLECs should not be able to obtain unbundled signaling in conjunction with unbundled switching if switching remains available. *See* Verizon at 133 n.480; BellSouth at 103; *see also* WorldCom at 121 ("[w]hen a CLEC purchases ILEC switching, the need for ILEC signaling is absolutely critical"); ALTS at 87-89. That is because of the way ILEC networks are designed, signaling technology is directly "linked" to the switch. As the Commission found in the *UNE Remand Order*, "[c]urrent switch technology requires each local switch to connect to a single STP [signaling transfer point," and that "[a]ll parties, including ILECs, agree[d] that because the ILECs' switching networks are already connected to a STP, a carrier that purchases unbundled switching from an incumbent LEC must also purchase signaling from that incumbent LEC." *UNE Remand Order* ¶ 386.[267]

Contrary to Verizon's suggestion, however, the Commission should continue to require access to certain call-related databases, including the Calling Name ("CNAM") and Line Information ("LIDB") databases, regardless of whether the CLEC is using unbundled switching

[267] As AT&T indicated, however, there is no apparent need for CLECs to be able to access unbundled signaling when they do not use ILEC switching. Such signaling is available from other suppliers on a regional (if not national) basis. *See* AT&T at 240 n.231.

or its own switching. *See* Verizon at 133-36.[268] Any attempt by CLECs to replicate these databases would be "wasteful" because CLECs simply lack the information necessary to populate properly these databases. Indeed, as the Commission found in the *UNE Remand Order* (¶¶ 415-16), "incumbent LECs are the only providers of CNAM database information." As a result, "in order for a switch-based competitor to provide caller ID to its customers, it must have access to the incumbent LEC's CNAM database." The Commission recognized that such access is especially important "because a majority of calls to a competitor's customers originate form the incumbent." *See also* WorldCom at 124-27. Similarly, the Commission correctly found that ILEC databases, including the LIDB database, are "critical to permitting the seamless routing and completion of traffic both among competitors and between competitors and the incumbent LEC." *UNE Remand Order* ¶¶ 411, 415. And as WorldCom demonstrated, any attempt by CLECs to replicate this database would result in a database of inferior "quality and ubiquity." WorldCom at 123 & Ku Declaration ¶ 8; *see also* ALTS at 90.[269]

[268] Access to call-related databases is clearly required when the CLEC purchases unbundled switching, because "signaling is necessary to obtain access to certain call-related databases." *UNE Remand Order* ¶ 411.

[269] The Commission should also reaffirm that CLECs are entitled to nondiscriminatory access to these databases. For example, WorldCom notes that "Verizon has taken the position that, when ordered as a UNE, the line information database (LIDB) can be used only to provide local service." WorldCom at 58. As WorldCom notes, such a restriction would be "particularly outrageous because the designation of LIDB as a database that must be unbundled was made with the knowledge that the most prevalent use of LIDB is to provide access services." *Id.* The Commission should vigorously enforce its unbundling rules, to ensure that incumbents do not impose unreasonable restrictions on UNEs that make them effectively unavailable.

XI. ADOPTION OF THE ILECS' PROPOSALS FOR MASSIVE PREEMPTION OF PRO-COMPETITIVE STATE ACTION WOULD BE BOTH UNLAWFUL AND BAD POLICY.

As discussed above, the States overwhelmingly support full retention of the current UNE list and of UNE-P in particular. Indeed, in a substantial number of cases, State commissions have already adopted additional unbundling obligations pursuant to either federal or state law (or both). Given the virtually unanimous support among the States for the current UNE list (or even for an expanded list), the ILECs recognize that, even if this Commission were to remove some network elements from the national list, many States might well continue to require ILECs to make some or all of those elements available under state law. *See, e.g.*, SBC at 40-41. To prevent this possibility, the ILECs now urge the Commission to launch a full-scale assault on the States' authority under the Act and state law, and to preempt any State unbundling determinations that extend "beyond that ordered by the Commission" in this proceeding. *See* Verizon at 64-66; SBC at 40-44; Qwest at 17-19; BellSouth at 110-12.

Such broad scale preemption would be unprecedented. Indeed, it is foreclosed by the Act, which is why all prior Commission orders have rejected it. The Act, the Commission's Rules and authoritative Court decisions all recognize that the Commission's unbundling determinations constitute a *floor*, and that States may build upon those determinations to establish additional such obligations under both federal and state law – as many States have done. Thus, the ILECs' proposal to convert the Commission's determinations from a floor into a ceiling is squarely contrary to both law and sound policy.

This same analysis also means that the State commissions should have the lead role in any "granular" "de-listing" of UNEs. Even if the Commission were to remove a UNE from the national list, a State commission may preserve that UNE on its State list, either under existing federal law, existing or new state law, or both. Accordingly, no UNE can be removed from the

list of available UNEs in any individual state unless both this Commission and the State commission concur.

Thus, as explained in AT&T's initial comments, in order to recognize the fundamental difference between adding and de-listing UNEs, the Commission should establish an orderly process by which no UNE will be de-listed in any State until the State commission, after conducting an evidentiary proceeding, has concurred in such de-listing for specifically defined circumstances and recommended that the Commission implement it. Giving States the lead role is fully consistent with *USTA* because State commissions are in a far better position than this Commission to develop and assess the "granular" evidence concerning the availability of UNE alternatives in their jurisdictions. Any such de-listing should, of course, be based upon review standards developed by the Commission. Notably, however, to the extent that CLECs remain impaired in self-deploying UNEs on the basis of factors that apply generally throughout the country for particular elements and/or classes of customers – such as the inability to obtain hot cuts for customer locations served by voice-grade loops – there is no basis for a State to commence any de-listing review.

A. The Act Makes Clear That Congress Intended States To Impose Additional Unbundling Requirements.

The plain language of the statute establishes that States have authority to impose unbundling requirements in addition to those imposed by the Commission, and that the Commission's pre-emptive authority over such requirements is extremely limited. Section 251(d)(3) – entitled "Preservation of State Access Regulations" – expressly states that "the Commission *shall not preclude the enforcement* of any regulation, order, or policy of a State commission that establishes access and interconnection obligations of local exchange carriers," as long as those obligations are "consistent with the requirements of [section 251]" and do not

"substantially prevent implementation of [section 251] and the purposes of this part." 47 U.S.C. § 251(d)(3) (emphasis added). The Act thus recognizes – and Congress took pains to make it express – that States may adopt additional unbundling requirements above and beyond the Commission's national list. Accordingly, Congress "explicitly disclaimed any intent categorically to pre-empt state law" in the manner proposed by the ILECs. *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987).

Indeed, sections 251(d)(2) and (d)(3) together establish a scheme of concurrent authority in which both the Commission and the States have authority to adopt unbundling obligations in certain circumstances, and section 251(d)(3) establishes a specific rule of pre-emption that governs those State "access and interconnection obligations." *See, e.g., English v. General Electric Co.*, 496 U.S. 72, 78-79 ("[p]re-emption is fundamentally a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the court's task is an easy one"). Under section 251(d)(2), the Commission establishes a national list of network elements to be made available for purposes of section 251(c)(3). This national list has pre-emptive effect in the States, and functions as a "floor," listing the minimum UNEs that must be made available in any State.

Section 251(d)(3), however, provides that the Commission "shall not preclude the enforcement" of additional State unbundling obligations, so long as those additional obligations are consistent with the statute. Qwest's contention (at 18) that States have no authority to adopt additional rules because "[w]here Congress sought to give the states a role in implementing the 1996 Act, . . . it did so explicitly" is thus wrong. Section 251(d)(3) "explicitly" recognizes and protects a separate sphere of State authority over interconnection and network element access requirements.

Similarly, in *Iowa Utilities Board* the ILECs claimed – much like Qwest claims here – that the Commission had authority to implement only those provisions of the Act that separately and explicitly grant such authority. The Court flatly rejected that argument, explaining, "[t]he fallacy in this reasoning is that it ignores the fact that [the general rulemaking provision of] § 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." *IUB*, 525 U.S. at 380 (emphasis in original). Section 251(d)(3) is likewise an "explicit" recognition of State authority.

By contrast, if the Commission's rules implementing the requirements of section 251 were to serve as both a "floor" *and* a "ceiling," as the ILECs propose, there would be no room at all for the additional State regulations section 251(d)(3) plainly contemplates, so that section 251(d)(3) would be read out of the Act. That would impermissibly "render Congress' specific grant of power to the States . . . meaningless." *Northwest Central Pipeline v. State Corp. Comm'n*, 489 U.S. 493, 515 (1989); *cf. California Federal Savings. and Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (finding that, under similar anti-preemption provision that preserved State law "unless . . . inconsistent" with the purposes and provision of the federal law, "Congress intended the [federal Act] to be a floor beneath which [state law] benefits may not drop – not a ceiling above which they may not rise").

The Commission has therefore consistently and properly construed the Act since the *Local Competition Order* to permit such additional State regulations. There, the Commission concluded that "state commissions may impose additional unbundling requirements pursuant to section 252(d)(3)" and that allowing States the ability to add UNEs provided "necessary flexibility" to accommodate local conditions. *Local Competition Order* ¶ 244. And in the *UNE Remand Order* the Commission reaffirmed this holding. *UNE Remand Order* ¶ 154 (section

251(d)(3) "grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list").

The ILECs briefly make four statutory arguments in response, each of which is meritless. *First*, although the terms of section 251(d)(3) are both clear and dispositive, the ILECs focus their attention on section 251(d)(2). They contend that the Commission's specific findings under the "necessary" and "impair" standards that a network element need not be made available under federal law is binding on any State's subsequent unbundling inquiry under state law. BellSouth thus claims (at 110) that if a State imposes an additional unbundling obligation it is "in violation of Section 251(d)(2)."

But section 251(d)(2) has no bearing on the States' authority to adopt additional UNEs under state law. That section provides only that the Commission, when it is establishing the minimum national list (which will have pre-emptive authority in the States as a floor), must apply the necessary and impair standards. By its plain terms, section 251(d)(2) does *not* apply to the States; it applies only to the Commission, and States therefore cannot "violate" it. The States' unbundling decisions are governed by section 251(d)(3), which expressly permits them to adopt additional "access and interconnection obligations" pursuant to state law, and thus without regard to the federal "necessary" and "impair" standards.

Accordingly, and contrary to the ILECs' claims (SBC at 42), the Supreme Court's opinion in *Iowa Utilities Board* does not remotely support their attempt to use section 251(d)(2) to trump the plain language of section 251(d)(3). The Supreme Court had no occasion to consider State authority under section 251(d)(3); it was considering only the federal rules promulgated by the Commission. The Court held merely that the Commission, when adopting the national list, must adhere to the "limits" prescribed in section 251(d)(2) (*i.e.*, the impairment

standard). By its plain terms, however, the impairment standard of section 251(d)(2) applies only to the Commission. By contrast, the Court expressly recognized – and did not disapprove – the established process: "[i]f a requesting carrier wants access to additional elements it may petition the state commission, which can make other elements available on a case-by-case basis." *Iowa Utilities Board*, 525 U.S. at 388.

To be sure, the States are also free to act pursuant to the Commission's regulations that delegate authority to the States to act pursuant to federal law and impose additional network element unbundling obligations applying the "necessary" and "impair" standards. *See* 47 C.F.R. § 51.317(d). Clearly, however, such a process does not bind the State when acting pursuant to state law.[270] Nor does it require a State to reach the same *results* as the Commission, but merely

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[270] As explained above, the plain terms of section 251(d)(2) establish that the "necessary" and "impair" standards apply only to the Commission. Section 251(d)(3) preserves State authority to adopt additional unbundled elements and expressly holds the States to a different, less stringent standard (which is set forth in subsections (B) and (C)). Therefore, Rule 317(d) could not be read as a limitation on all State authority to adopt unbundling requirements without violating the express terms of section 251(d)(3). Indeed, such a reading would be absurd because it would have the effect of aggressively preempting numerous State telecommunications laws, passed by the legislatures of the several States. Rather, the purpose and effect of Rule 317(d) is to provide State commissions the option of proceeding under federal law in the absence of a State statute. In essence, the Commission will recognize the validity of additional unbundled elements in a particular State – as a matter of federal law – if the State commission finds that the federal "necessary" and "impair" test has been satisfied in its jurisdiction.

Indeed, in recent years a number of the nation's largest States have passed legislation that provides their State commissions with broad authority to adopt additional UNEs, and those commissions have ordered outcomes that differ in some ways from those reached by the Commission. For example, Texas has adopted legislation that permits the Texas PUC to adopt additional unbundling requirements, and specifies that "[b]efore ordering further unbundling, the commission must consider the public interest and competitive merits of further unbundling." Texas Public Utility Regulatory Act, Chapter 60, Subchapter B, § 60.021. Pursuant to this authority, the Texas PUC recently ordered that the switching element be made available without limitation. See Arbitration Award, *Petition of MCIMetro Access Transmission Services, et al., For Arbitration With Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, PUC Docket No. 24542 (Tex. PUC, issued April 29, 2002). Similarly, the Illinois Commerce Commission recently ordered Ameritech, pursuant to its authority under both federal (continued . . .)

to apply the same standards. A State applying that standard to a record focused on state-specific evidence could certainly reach a different conclusion than the Commission did in examining a national record without "violating" either section 251(d)(2) or any Commission regulation.

Second, Verizon – the only ILEC that even mentions section 251(d)(3) in its comments – claims that sections 251(d)(3)(B) and 251(d)(3)(C) preclude States from identifying additional network elements. *See* Verizon at 65-66. This claim does not withstand scrutiny. Section 251(d)(3)(B) makes clear that States may adopt additional "access and interconnection obligations" as long as they are "consistent with the *requirements* of this section" – *i.e.*, the explicit duties and obligations that the section imposes upon incumbents. Where section 251 does not impose a "requirement" (*i.e.*, does not mandate action), States may adopt additional requirements (*i.e.*, mandate additional actions). As long as an incumbent can comply with both federal and state requirements, section 251(d)(3)(B) does not authorize the Commission to pre-empt the state policy. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977) ("Since it would be possible to comply with the state law without triggering federal enforcement action we conclude that the state requirement is not inconsistent with federal law").

Verizon's contrary argument (at 66) – that if the Commission has made a finding of no impairment with respect to a particular network element, "then any state action to mandate access to that UNE would likewise be inconsistent with section 251" – is wrong for the three reasons explained above. First, the "impair" standard of section 251(d)(2) does not apply to States operating under state law. Second, the mere fact that the Commission has examined nationwide evidence and has concluded that there is no impairment for purposes of establishing

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and state law, to provide combinations of unbundled network elements, including both UNE-P
(continued . . .)

the *national* list does not mean that a State commission could not examine state-specific evidence and conclude that, within that State, competitive LECs are in fact impaired. Third, when the Commission decides *not* to unbundle a network element, it does not create any "requirement" at all under the Act – to the contrary, it *declines* to create a requirement – and therefore there can be no resulting "inconsistency" between the state law and any federal law "requirement."

Subsection (C) likewise offers no basis for preemption. It pre-empts State requirements only if they would "substantially prevent implementation of [section 251] and the purposes of this part." The purpose of this part [*i.e.*, sections 251-61] is to promote local competition. *See, e.g., Iowa*, 525 U.S. at 371 (the 1996 Act creates duties that are "intended to facilitate market entry," and "foremost among these duties is the LEC's obligation under 47 U.S.C. § 251(c) . . . to share its network with competitors"). Moreover, the Supreme Court has recognized that "elimin[ation of] the [ILECs'] monopolies" is "an end in itself" of the 1996 Act, and that the Act is "designed to give aspiring competitors every possible incentive to enter local telephone markets, short of confiscating the incumbents' property." *Verizon*, 122 S. Ct. at 1654, 1661. Congress, in enacting section 251(d)(3), has expressly permitted States to pursue regulatory philosophies and approaches that differ from the Commission's, as long as they "share a common goal" to promote competition generally and do not directly conflict with or prevent implementation of the requirements of section 251. *California Federal*, 479 U.S. at 288. To equate each of the Commission's specific regulations with the general "purposes of this part"

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and EELs, in order to promote competition in Illinois residential and small business markets.

would also read section 251(d)(3) out of the Act and leave no room for the role that Congress expressly gave the States.

Indeed, Verizon's theory appears to presume that any federal law that imposes limits on the scope of a federal regulatory obligation necessarily preempts state laws that go beyond those limits as in that sense "inconsistent" with federal law. But Congress frequently enacts schemes that contain federal "limits" that States may exceed under state law.[271] That is why, when Congress instead determines that a federal regulatory standard is to be not only a "floor" but also a "ceiling," it generally says so expressly.[272]

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[271] *See, e.g., Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985) (locality's more stringent blood plasma regulations not pre-empted by less stringent federal law); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963) (state's more stringent agricultural regulations not pre-empted by less stringent federal regulations); *Atherton v. FDIC*, 519 U.S. 213 (1997) (federal law imposing gross negligence standard of care on savings and loan officers did not pre-empt state law imposing a stricter standard of simple negligence); *Watson v. Buck*, 313 U.S. 387, 403 (1941) (state antitrust laws that prohibit conduct that the federal antitrust laws permit not pre-empted); *see also New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 415 (1973) ("[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem").

[272] *See, e.g.*, 49 U.S.C. § 30103(b) (National Traffic and Motor Vehicle Safety Act)(providing that whenever a federal motor vehicle safety standard is in effect, no State may establish a standard that is not identical to the federal one); 49 U.S.C.A. § 20106 (West 1995) (Federal Railway Safety Act) (permitting a State to adopt a railroad safety rule more stringent than that adopted by the Secretary of Transportation only in specified circumstances); 15 U.S.C. § 1334 (Public Health Cigarette Smoking Act) ("No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter"); 7 U.S.C. 136v(b) (Supp. 1995) (Federal Insecticide, Fungicide, and Rodenticide Act) (State "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter"); 46 U.S.C. § 4306 (Federal Boat Safety Act) ("Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of

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Third, SBC (at 41-42), while ignoring section 251(d)(3), claims that section 261(c) supports broad scale preemption here. Section 261(c) provides that "[n]othing in this part shall preclude a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations implementing this part." This "part," however, *includes* section 251(d)(3), which adopts a special rule of preemption that applies to State "access and interconnection" requirements. Section 261(c) therefore reinforces section 251(d)(3).

SBC's argument is particularly weak to the extent it asks the Commission to preempt State decisions regarding access to loops used to provide broadband services. Section 706 confirms that Congress intended that there would be a role for "each State commission with regulatory jurisdiction over telecommunications services" to encourage the deployment of wireline broadband services through various regulatory means. Section 706 (emphasis added) provides:

> The Commission *and each State commission with regulatory jurisdiction over telecommunications services* shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, *measures that promote competition in the local telecommunications market*, or other regulating methods that remove barriers to infrastructure investment.[273]

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marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title").

[273] Pub. L. 104-104, Title VII, § 706, 110 Stat. 153 (1996) (reprinted in 47 U.S.C. § 157, historical and statutory notes). "[A]dvanced telecommunications capability" squarely encompasses wireline broadband Internet access services. 47 U.S.C. § 157, statutory note (c)(1) (defining "advanced telecommunications capability" as "high-speed, switched, broadband (continued . . .)

By its terms, section 706 reflects Congress' clear intent that *both* the Commission *and* "each State commission with regulatory jurisdiction over telecommunications services" would have *concurrent* roles "regulating" wireline broadband services. Indeed, section 706 employs precise language to avoid ambiguity on this point: "*each* State Commission" "shall encourage deployment" using "measures that promote competition in the local telecommunications market" – as unbundling requirements clearly do.

B. Preemption Of State Unbundling Decisions Would Be Unsound Public Policy.

Even if the Commission had the authority to pre-empt State unbundling decisions, such preemption would be strongly contrary to the public interest. As the Commission has recognized in other contexts, State commissions are in the best position to assess the local variations that will naturally occur in the availability of unbundled network elements. *See, e.g., Michigan 271 Order* ¶ 30 ("We believe that the state commissions' knowledge of local conditions and experience in resolving factual disputes affords them a unique ability to develop a comprehensive, factual record regarding the opening of the BOCs' local networks to competition"). Moreover, the comments confirm that State commissions are in a much better position than this Commission to develop and assess evidence concerning the availability of UNE alternatives in their jurisdictions, because they typically conduct extensive evidentiary proceedings using discovery, live testimony and cross-examination to develop and resolve factual issues that are involved in any localized impairment analysis. *See, e.g.*, ASCENT at 32-33 ("State regulatory commissions are also better suited to conduct the detailed hearings

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telecommunications capability that enables users to originate and receive high-quality voice, data, graphics and video telecommunications").

necessary to ensure the development of full and complete records"). The Commission obviously does not have the resources to conduct the sort of evidentiary and fact-based analysis that would be needed for any geographically targeted impairment analysis. *See, e.g.*, UNE Platform Coalition at 26-27 ("[n]otice and comment proceedings, which are typically conducted exclusively through the submission of written documents (initial and reply comments, and ex parte filings) do not include the discovery, witness testimony, and cross examination on the record that are the basic vehicles used by State regulators to test veracity and resolve complex factual issues"). Moreover, preemption would deprive the Commission of the opportunity to learn from State experiments and efforts. *See, e.g.*, UNE Platform Coalition at 31 ("the national experiment with local competition is still under way, with the States continuing to supply the differentiation and inventiveness needed for the evolution of competition to continue," and the "Commission must assure that its UNE Triennial Review proceeding not disrupt this process").

Full-scale preemption would also be inconsistent with basic principles of federal-state comity, and would needlessly jettison the federal-state partnership that has worked effectively until now. *See, e.g.*, ALTS at 131 ("the process the Commission established in the *UNE Remand Order* has worked well"). State commissions are unquestionably in a better position than the FCC to determine the specific policies and measures necessary to promote competition in their individual jurisdictions. *See* UNE Platform Coalition at 29-30 ("[o]nly the States are in the position to fully understand the interrelationship between retail price regulation and local competition and to guard against an outcome where consumers lose the protection of regulation without first enjoying its preferable alternative, *i.e.*, competition"). Indeed, in many instances, a State's unbundling requirements are part of a more comprehensive alternative regulation scheme, and represent only a part of a larger regulatory bargain; for example, a situation which the

incumbent receives a regulatory benefit, such as price cap regulation or other pricing flexibility, in exchange for agreeing to provide access to certain UNEs. Under such circumstances, Commission preemption – even if lawful – would severely undermine State regulation, because by removing one part of the bargain, the Commission would require State commissions to reopen the other parts as well. Such limitations would also severely curtail the States' ability to craft such broad-based solutions in the future.

C. State Commissions Should Conduct De-Listing Proceedings In Instances Where The Commission Has Found That Impairment Exists Generally, But The Factors Demonstrating Impairment May Not Apply On A National Basis.

The commenters also support the adoption of an orderly procedure along the lines proposed by AT&T (at 246-52), under which no UNE would be de-listed in any State until the relevant State commission concurs, based upon a review of the relevant factors in its jurisdiction. *See especially* Michigan at 5-6. Indeed, the States almost unanimously urge the Commission to permit them to fully participate in any future decisions to remove any unbundled network elements from the national list. *See, e.g.*, NARUC Resolution Concerning the States' Authority to Add to the National Minimum List of Network Elements (Feb. 2002) (NARUC "urges the FCC to recognize that States may continue to require additional unbundling to that required by the FCC's national minimum"); New York at 8 ("the NYDPS urges the Commission to continue to correctly implement section 251(d)(3) of the Act, which permits states, if they choose, to add to the minimum list of national UNEs and adopt policies that reflect local market conditions that are consistent with the Act"); Texas at 7 ("the Texas PUC urges the FCC, should it choose to move forward in this proceeding, to do so in full collaboration with state regulatory agencies. We believe it would be most prudent to evaluate and address the myriad of issues within this NPRM as a whole, and in concert with the states"); *see also* Georgia at 5; Pennsylvania at 5-6;

Oklahoma at 4-6; Florida at 2, 5-6; Indiana at 5, 10; Illinois at 3; Massachusetts at 3; Michigan at 3-4; Kansas at 3-4.

The Commission should accede to the States' request. Indeed, in light of the enormous efforts of many States over the past few years to use their authority to encourage viable competitive entry in their jurisdictions – and the substantial success that several such efforts begun to generate – it would be astonishing for the Commission to adopt a sweeping preemption of States' efforts to establish local competition, and to endorse the ILECs' proposal to relegate the States to the status of impotent bystanders.

It is important to stress, however, that under the regime set forth in the Act – and especially given *USTA's* focus on "granularity" – de-listing under federal law cannot properly occur unless both this Commission and the applicable State commission agree that a network element should no longer be unbundled under particular circumstances, provided that the State determinations are made pursuant to guidelines established by the Commission. AT&T at 243 ("[W]hile the Commission has plenary authority to *add* a UNE to the national list, the Commission and the state commissions have, in effect, concurrent authority over whether a UNE will removed in a given state."). Further, under the procedures advocated by AT&T and others, State de-listing inquiries would be based upon evidentiary proceedings regarding local competitive conditions in which the State would apply the evidence to factors the Commission identifies as relevant to determining impairment. *See* AT&T at 249. Thus, in cases where the Commission determines that CLECs are impaired with respect to a particular network element because of factors that do not vary by geography or for a particular class of customers, a State should not be permitted to conduct a de-listing proceeding. This is necessary in order to prevent

ILECs from filing frivolous or overreaching petitions to de-list UNEs that are clearly needed to support competition.

As explained in detail in Parts VI-X above, the record demonstrates conclusively that the impairments CLECs suffer are generally national in scope for the affected customer groups. Therefore, it would be premature to allow individualized State de-listing proceedings with respect to these elements – at least for the purposes AT&T has identified. For example, all loops and transport facilities enjoy enormous economies of scale that CLECs cannot be expected to match, regardless of where they are deployed. It is also a "national" fact that the cost of these facilities are sunk, so that a CLEC seeking to self-deploy point-to-point transmission facilities risks losing those investments if anticipated demand does not materialize or cannot be retained.

The case for a national unbundling requirement for unbundled switching (and the related signaling and shared transport UNEs) when used in conjunction with voice-grade loops is just as compelling.[274] The principal impairment CLECs face in using non-ILEC switching is the fact that customer loops are hard-wired to the ILECs' switches in the ILECs' ubiquitously deployed network architectures. That means low volume customer locations served by voice-grade loops can only be moved to a CLEC switch through the use of a manual a "hot cut" to break this connection and re-establish a new connection with the CLEC switch. Market experience over the past few years shows that hot cuts cannot be performed in a commercially reasonable manner. Moreover, even if hot cuts could be performed flawlessly and at low cost (a significant

[274] This means that there would be national *de*-listing of the ULS-related UNEs on a standalone basis or if they would be used in combination with a DS-1 or higher capacity loop to serve a higher volume customer location.

problem in many areas), CLECs are forced to incur significant collocation and transport costs that the ILECs never face.[275]

Given the current state of ILEC networks and competitive facilities deployment, the ongoing "capital crisis" in the telecommunications marketplace[276] and the existing national impediments to CLECs' ability to self-deploy facilities, it does not appear that the CLECs' impairments will abate significantly over the next several years. Thus, there is little need to focus on factors that States should use to de-list any of these UNEs during that time. However, given that there are some limited alternatives to ILEC dedicated transport facilities in a few major metropolitan areas, it might be useful for the Commission to identify factors that States could use to review whether there are sufficient alternatives to unbundled transport to enable that element to be de-listed in limited circumstances, provided that the existing national impairments have been eliminated.[277]

Such factors must, of course reflect the core economic realities that (i) the relevant market for transport facilities is extremely localized and consists exclusively of point-to-point routes, *see Notice* ¶ 62, and (ii) capital markets have effectively dried up, especially for new entrants. Further, any such analysis must recognize that competition is most likely to develop

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[275] Similarly, as described in Parts X above, there is no basis to allow State proceedings to consider de-listing either the specific ILEC databases that are essential to competition, signaling and shared transport used in connection with leased switching, or OSS.

[276] *See* FCC New Release, *FCC Chairman Michael Powell Appointed to President Bush's Corporate Fraud Task Force* (July 9, 2002) ("There is a severe capital crisis putting a tremendous strain on the telecommunications industry. It is imperative to do everything possible to restore investor confidence in this critical sector of the American economy.").

[277] In particular, as described above, existing co-mingling and use restrictions that deny CLECs the ability to obtain the scale economies enjoyed by the ILECs must be eliminated and effective performance standards put in place before any such de-listing should be permitted.

first for the highest capacity levels (*e.g.*, OCn). *See id.* ¶ 41. Thus, impairment must be analyzed on both a route-by-route basis and a capacity-specific basis, and the scope of any de-listing must be limited to those routes and capacity levels where self-deployment by multiple carriers is economically feasible and capital is available at viable rates.

As described above in Part VIII, to the extent that the Commission finds the general impairments that affect dedicated transport may not apply in all areas, AT&T suggests that the States should be directed to undertake a three-part inquiry in the reviewing the availability of alternatives to unbundled dedicated transport. First, the State should assess whether, for the routes and capacity levels in question, alternative transport facilities are, in fact, available to CLECs. Second, the State should examine whether, for those same routes and capacity levels, CLECs realistically have the ability profitably to self-deploy transport facilities. Third, to the extent a State finds CLECs may not be impaired with respect to particular routes/capacity, it should be required to identify a process (subject to reasonable minimum standards established by the Commission) that addresses the transition period that should apply under the circumstances. This is critical to enable affected carriers make other arrangements in light of the changed rules.

States are clearly in a much better position to make these "granular" determinations than the Commission. Clearly, there is no reason to expect that local transport competition will develop evenly across the country. *See Notice* ¶ 62. Rather, it will emerge gradually, in pockets, and then spread out over time. Thus, because there will be significant local variation in the availability of transport alternatives, and a uniform, national de-listing determination could not adequately account for all of the relevant factors for each route and type of facility for which dedicated transport is needed in each local market. Moreover, the States are clearly in the best position to balance these factors in their jurisdictions to assess whether competitive alternatives

are actually available at a price that will support long-term competition. This is particularly true given that many State commissions have gained experience analyzing the relevant factors from their investigations into how intra-state high-capacity services should be rate regulated. *See, e.g.*, *Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting*, Case Nos. 00-C-2051 (NYPSC June 15, 2001).

Finally, the Commission should also adopt appropriate procedures to ensure that the Commission can step in, in the unlikely event that a State fails to apply the standards the Commission adopts to guide State de-listing determinations. In particular, once the Commission determines that there may be localized conditions that merit a more "granular" review of whether CLECs are impaired without access to a particular UNE in some circumstances, it would authorize (but not necessarily require) the States to conduct de-listing proceedings. After gathering the necessary evidence pursuant to the applicable state procedures (which would presumably include the ability to hold live hearings and permit cross-examination), the State commission would issue a written recommendation to the Commission specifying whether, and under what circumstances, the element should be de-listed in its jurisdiction, the reasons for its decision, and its recommended transition plan.

The State commission's decision would then be submitted to the Commission for final action. Although parties disagreeing by the State's decision should be allowed to seek Commission review of the State's recommendation, the Commission could, if it chose, adopt a rule that deemed the State's recommendation will be effective unless the Commission acts within

a specific time to delay or reject it.[278] In reviewing the State decision, moreover, it would not be appropriate for the Commission to second-guess State factual determinations. Instead, the Commission review should focus on whether the State reasonably followed the standards laid out by the Commission.

The allocation of responsibility between the State commissions and this Commission in such a process would thus be analogous to the role each plays in implementing sections 252 and 271. The specific rates and terms of interconnection agreements are set in the first instance by the State commissions, applying the general regulations established by the Commission to the particular facts found in that State. Subsequently, when a BOC files a section 271 application, the Commission reviews the State commission's application of fact to the controlling legal standards under a deferential standard. *See, e.g., NY 271 Order* ¶ 20.

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In sum, the Commission should reaffirm State commissions' statutory role in adding network elements pursuant to the specific competitive circumstances in their jurisdictions, and there is no basis under the Act to accede to the ILECs' urgings to preempt them generally from continuing in that role. And to the extent that localized competitive developments render it reasonable to review CLEC impairment on a more granular basis, such inquiries should be made in the first instance by the State commissions that are closest to the marketplace facts and that have more effective evidence-gathering tools and processes at their disposal.

[278] *See, e.g.*, 47 C.F.R. § 63.71(c) (applications to discontinue service by domestic carriers automatically granted if the Commission does not act within a prescribed time).

CONCLUSION

Consistent with *USTA*'s call to focus only on evidence of impairments that are "linked (in some degree) to natural monopoly" characteristics of local exchange markets, the huge record of CLECs' actual market experience clearly demonstrates that CLECs are significantly impaired without continued access to the unbundled network elements identified in the *UNE Remand Order* and the *Line Sharing Order*. Moreover, both the structure of the Act and the Supreme Court's prior rulings, together with the detailed factual record amassed here, show that the presence (or absence) of implicit subsidies in the retail rates of some customers does not support any limitation on the availability of UNEs.

Critically, the State commissions, which have been overseeing the CLECs' attempts to compete at the local level, all agree with AT&T and other CLECs that the continued and broad availability of unbundled network elements – especially the UNE-P combination – is necessary to support CLECs' efforts to "jump-tart" local competition and "eliminate" the ILECs' local monopolies. *Verizon*, 122 S. Ct. at 1654, 1661. Accordingly, the substantial record, supported by the views of impartial State regulators seeking to support the Act's pro-competition and pro-consumer goals, demonstrate that the Commission should:

(1) maintain its existing national list of UNEs;

(2) eliminate the "interim" use and commingling restrictions and assure CLECs have unrestricted access to existing and new loop/transport combinations;

(3) correct the definitional and other errors that prevent CLECs from accessing NGDLC loops in central offices;

(4) modify the switching "carve-out" so it applies only to customer locations served by DS-1 and higher capacity loops; and

(5) provide that unbundled switching must remain available for voice-grade loops in an office unless and until electronic loop provisioning is implemented and a competitive market for local switching has developed.

The Commission also must not accede to the ILECs' efforts to cut off the States' ability to tailor competitive rules in their jurisdictions to the actual market circumstances, under either federal or state law. Thus, the Commission should not – and under applicable law may not – exercise any preemptive authority here that would preclude States from adding to the national minimum UNE list. Moreover, to the extent that the Commission in the future seeks to de-list UNEs using a "granular" impairment analysis that consider geographically specific factors, it should look to the States to review the relevant facts and review the States' recommendations under a deferential standard.

Finally, the Commission must recognize that its decision here will be taken as a signal in the capital and financial markets as to whether local competition and the goals of the 1996 Act will succeed or fail. Indeed, its choice is not between UNEs and no (or fewer) UNEs but between competition and no competition. Thus, the Commission should reject the false investment choices the ILEC proffer, all of which ignore the huge and very real market power and the "almost insurmountable competitive advantage," *Verizon*, 122 S. Ct. at 1662, that flows

from the natural monopoly characteristics of their ubiquitous networks. Indeed, faithful implementation of the Act, especially in light of "current market conditions" requires that the Commission adopt AT&T's proposals.

Respectfully submitted,

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July 17, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2002, I caused true and correct copies of the forgoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: July 17, 2002
Washington, D.C.

/s/ Peter M. Andros

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